Supreme Court, U.S.
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No. 10-665

In the Supreme Court of the United States

DONALD BROWN,

Petitioner,

v.

KANSAS CITY FREIGHTLINER SALES, INC., doing business as Joplin Freightliner Sales; WESTFALL-O'DELL MOTORS, INC., doing business as Westfall-O'Dell Transportation Specialists,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. What information must an employee provide his or her employer to trigger an employer's duties under the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654, as further defined by 29 C.F.R. § 825.303 (1995)?

2. Does an employee, with a history of minor (non-FMLA qualifying) back injuries, provide sufficient notice to his employer to trigger the employer's duties under the FMLA when the employee leaves work early under a complaint that he has "hurt his back" again, denies that he needs to visit a doctor, and then calls in "sick" for the next four workdays?

CORPORATE DISCLOSURE STATEMENT OF RESPONDENT KANSAS CITY FREIGHTLINER SALES, INC.

Pursuant to Supreme Court Rule 29.6, Respondent Kansas City Freightliner Sales, Inc., d/b/a Joplin Freightliner Sales, states that it is not publicly traded. It does not have a parent corporation nor does any publicly-held corporation own ten percent (10%) or more of the stock of Kansas City Freightliner Sales, Inc.

CORPORATE DISCLOSURE STATEMENT OF RESPONDENT WESTFALL-O'DELL MOTORS, INC.

Pursuant to Supreme Court Rule 29.6, Respondent Westfall-O'Dell Motors, Inc., d/b/a Westfall-O'Dell Transportation Specialists, states that it is not publicly traded. It does not have a parent corporation nor does any publicly-held corporation own ten percent (10%) or more of the stock of Westfall O'Dell Motors, Inc.

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REGULATORY PROVISION INVOLVED

The definition of "serious health condition" is contained within 29 C.F.R. § 825.114 (1995). The relevant portions of that definition are as follows:

> (a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:
>
> (1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or
>
> (2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
>
> (i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

STATEMENT OF THE CASE

A. Factual Background.

Respondent Kansas City Freightliner Sales, Inc., doing business as Joplin Freightliner, employed Petitioner Donald Brown as a technician, performing repairs on heavy duty trucks. Prior to the incident which gives rise to this matter, Brown had a prior history of minor lumbar sprains, for which he had received medical treatment, none of which resulted in missed time from work. On one of those prior occasions, Brown was placed on work restrictions for roughly one month, though he was still able to perform work during that period. On each of those prior occasions, Brown completed an incident report regarding his injuries.

On the afternoon of Wednesday, September 26, 2007, Brown approached his supervisor, Mike Yokely, stating that he had "hurt his back again" and

wanted to go home. When asked if he wanted to go to the doctor, Brown said no. Brown then left the workplace, without filling out an incident report.

Brown was absent from the workplace for four consecutive workdays from Thursday, September 27 through Tuesday October 2, 2007. On each of those days, either Brown or his wife called Freightliner, stating that Brown would not be coming into work because Brown was "sick." No other information was provided to Freightliner during those telephone calls.

On Sunday, September 30, 2007, Brown was seen by co-workers driving his vehicle. In the course of his deposition, Brown was asked a series of questions about whether he was able to carry out his daily activities during his absence from the workplace. During that exchange, Brown interjected that he was not "disabled" during his absence. He also conceded that the reason he was absence from the workplace was not due to being unable to work due to his injury, but rather because he was tired. He acknowledged that he did not seek out medical evaluation during his absence, but instead took prescription pain medications that were left over from his prior injuries.

On Wednesday, October 3, 2007, Brown returned to the workplace, with the intention to return to work. However, management had terminated his employment for absenteeism, as Brown had previously exhausted all of his vacation and sick leave prior to leaving the workplace on September 26, 2007.

Brown sought out medical evaluation and treatment for his claimed "back" injury for the first time on October 12, 2007, sixteen days after his claimed injury. At that time, he reported symptoms of neck pain and left arm numbness, rather than the back pain reported to his supervisor. He reported no prior trauma or injury during that examination. He was ultimately diagnosed with a *cervical* sprain, for which he received medical attention on a number of occasions, culminating in surgical treatment on April 25, 2008, where several of Brown's cervical vertebrae were surgically fused.

B. The Proceedings Below.

Brown brought suit in the U.S. district court for the Western District of Missouri against Kansas City Freightliner Sales, Inc., and its parent company, Westfall-O'Dell Motors, Inc., doing business as Westfall-O'Dell Transportation Specialists (hereafter collectively referred to as "Freightliner"). In his Complaint, Brown sought damages against Freightliner raising two claims under the Family Medical Leave Act ("FMLA"). His first claim was that his employers violated the FMLA by failing to reinstate him to his position after he returned to the workplace on October 3, 2007. For his second claim, he sought relief under a theory that his employers had retaliated against him for seeking leave under the FMLA.

After discovery was substantially completed, Freightliner filed a motion seeking summary

judgment upon Brown's FMLA claims. The district court granted that motion, concluding that Brown's claims failed because (1) Brown could not establish that his absence from the workplace was due to a "serious health condition" that would qualify for protection under the FMLA, and (2) Brown failed to provide sufficient notice to his employer that his absence from work qualified for protection under the FMLA.

Brown timely appealed the grant of summary judgment to the U.S. Court of Appeals, Eighth Circuit. While he challenged both grounds of the district court's grant of summary judgment, the Eighth Circuit only addressed the second ground (adequacy of notice under the FMLA) in its opinion.

REASONS FOR DENYING THE PETITION

A. This Matter Does Not Provide A Proper Vehicle For Addressing Brown's Claimed Circuit Split.

Freightliner disagrees with Brown's assertion that there exists a substantial disagreement between the circuit courts regarding the standard for assessing the adequacy of an employee's notice to the employer when unforeseeable leave is sought under the FMLA. However, even if such disagreement exists between the circuits, this case does not present a viable means to resolve that purported disagreement for two reasons. First, while the circuit court affirmed the grant of summary judgment in this matter on the basis of the FMLA notice issues, the summary judgment was also premised upon Brown's failure to demonstrate that his absence was due to a FMLA-qualifying serious health condition, and this alternative basis would render it unnecessary for this Court to address the notice issues raised in Plaintiff's Petition for Writ of *Certiorari*. Second, the information Brown communicated to his employer was so inadequate as not to meet the standards set by any of the federal circuit courts.

The district court's grant of summary judgment rested upon two independent grounds: (1) absence of evidence of a FMLA-qualifying "serious health condition" and (2) Brown's failure to provide adequate notice to Freightliner under the FMLA. Both grounds were argued in the proceedings before

the U.S. Court of Appeals for the Eighth Circuit. However, the circuit court, in affirming the judgment below, only discussed the notice issue in its decision. Finding that the notice issue was sufficient to resolve the appeal, it was unnecessary for the Eighth Circuit to address the district court's conclusion that Brown had failed to adequately dispute Freightliner's showing that there was no evidence from which a factfinder could conclude that Brown's absence from work was due to a "serious health condition," as defined by the FMLA.

As a threshold matter, in order to invoke the protections of the FMLA, an employee's absence must be due to a "serious health condition." 28 U.S.C. § 2611(11). Brown argued that his alleged back injury qualified as a "serious health condition" under the "continuing treatment" because his condition resulted in a period of incapacity of more than three consecutive days and involved treatment on at least two times by a health care provider.

The district court concluded that Brown could not prove that his absence was due to a "serious health condition" because he did not seek out medical evaluation or treatment during his absence from the workplace. In reaching that conclusion, the district court, in reliance upon the Eighth Circuit case of *Rankin v. Seagate Techs., Inc.*, 246 F.3d 1145, 1148 (8th Cir. 2001), as well as the language of 29 C.F.R. §§ 825.114 and 825.115 (1995). In particular, the district court noted that "incapacity," under the latter regulation, meant that the employee was "unable to perform the functions of [his or her]

position where the health care provider finds that the employee is unable to work at all or is unable to perform any of the essential functions of the employee's position...." 29 C.F.R. § 825.115. Based upon this language, and the guidance of *Rankin*, the district court concluded that Brown could not demonstrate incapacity during the period of his absence, as there was no evidence presented by Brown that his health care provider made any such finding regarding the period of his absence.[1]

The absence of any discussion in the Eighth Circuit opinion regarding this alternative ground for the grant of summary judgment does not preclude this court's consideration of whether this alternative ground provides a basis for affirming the district court's judgment. "Without cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected,

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[1] This absence of evidence was compounded by his failure to designate any expert witness to offer an opinion that his alleged injury rendered him unable to work during his absence. The absence of expert testimony on this issue, was even more significant, in light of evidence presented below that Brown was not incapacitated during his absence from the workplace, including: (1) Brown's failure to seek medical treatment during the period of his absence, (2) Brown's deposition testimony that he was not "disabled" during his absence from the workplace. While Brown also attempted to relate his post-termination treatment to his pre-termination complaints. However, without expert testimony, he could not demonstrate that the post-termination treatment of his *cervical* spine for complaints neck pain and arm numbness were connected to his pre-termination treatment for back pain caused by *lumbar* sprains.

or even considered by the district court or the Court of Appeals.' " *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989) (quoting *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 476, n. 20 (1979)). That alternative basis, if upheld by this Court, would make it unnecessary to reaching the question Brown seeks to present in this appeal.

While Brown mentions this alternative ground for summary judgment in his Petition, he does not raise any Question Presented regarding this alternative basis for summary judgment. Thus, he does not contend that resolution of that alternative ground presents any issue of legal significance as to lower court's application of the FMLA. However, the existence of this alternative ground upon which the district court's judgment could be affirmed, for which Brown has not sought review, renders it unnecessary for this Court to address the issues raised in Brown's Petition to this Court.

Simply put, the existence of this alternative basis for affirming the judgment below makes this case an inadequate vehicle for addressing the issues Brown seeks to raise with regard to the standard that must be met to provide adequate notice to an employer to trigger the protections of the FMLA. The district court's judgment can be affirmed on the alternative grounds discussed in the district court judgment. Brown does not seek to put these alternative grounds before this Court for review. However, those alternative grounds render it unnecessary for this Court to take up and decide the merits of the issues

Brown discusses in his Petition for Writ of Certiorari. Accordingly, this Court should deny Brown's Petition and decline review in this matter.

B. Even If A Circuit Split Existed As To The Interpretation of 29 C.F.R. § 825.303 Before The Regulation Was Amended In 2009, The Amendment To The Regulation Makes It Inappropriate To Grant Review.

As discussed in Section C, below, Freightliner disagrees with Brown's suggestions that a split has emerged among the circuit courts with regard to the standard that should be applied to determine whether an employee has adequately notified his or her employer that a request for leave falls within the ambit of the FMLA. However, even assuming a circuit split existed, the underlying regulation was amended after the events giving rise to this case. The issues Brown seeks to raise would only have application to cases arising under the prior version of the regulation, a limited and dwindling group of cases.

The primary federal regulation governing the notice requirements under the FMLA is 29 C.F.R. § 825.303. This regulation was amended, effective January 16, 2009, after the events underlying this matter occurred. Those amendments provide specific guidance with regard to the *substance* of the notice an employee must provide to his or her employer in order to invoke protection under the FMLA. At least one circuit court has recognized that the amended

regulation places a significantly higher upon employees, compared to the regulation in effect prior to 2009. *See Saenz v. Harlingen Medical Center, L.P.*, 613 F.3d 576, 582 n. 9 (5th Cir. Aug. 2, 2010) (refusing to apply amendment retroactively because of increased burden on employee).

Under the amended version of the regulation, "[a]n employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request." 29 C.F.R. § 825.303(b). The regulation further states that the content of the notice will vary on the precise situation involved, but may include that "a condition renders the employee unable to perform the functions of the job," that "the employee ... is under the continuing care of a health care provider," and "the anticipated duration of the absence." *Id.* The amended regulation also expressly provides that "[c]alling in 'sick' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act." *Id.*

Contrary to Brown's assertion that the notice he provided would be sufficient to satisfy the amended regulation, the circumstances of this action demonstrate that his communications to his employer fell far short of the requirements imposed by 29 C.F.R. § 825.303 (2009). The amended regulation states that merely "calling in sick," is insufficient to constitute adequate notice. Brown left the workplace early, complaining that he had hurt his back. However, over the following four workdays, he or his wife called Freightliner reporting only that

Brown was "sick" and would not be coming in to work. Neither Brown nor his wife provided any other information to Freightliner.

Brown's conduct ultimately deprived Freightliner of the information it needed to assess whether Brown's absence fell within the FMLA. Brown refused his supervisor's inquiry as to whether Brown needed to go to the doctor. Brown also failed to advise his employer of the anticipated duration of his absence. Brown failed to seek medical evaluation for weeks after his alleged back injury, such that there was no contemporaneous medical diagnosis of Brown's alleged injury, let alone any finding by a medical professional that Brown was incapacitated and unable to work during his absence from the workplace.

In summary, Brown failed to give his employer any indication that his absence from the workplace was due to anything other than a minor, transient, health issue. Certainly, he provided his employer with nothing that should have led Freightliner "to reasonably determine" that Brown's absence was due to a serious health condition for which he might qualify for leave under the FMLA. Thus, contrary to his arguments in this Court, his conduct would not satisfy the requirements of the amended regulation, 29 C.F.R. § 825.303 (2009).

The amendments to the regulation discussed above specifically address the key issues that Brown claims divide the circuit courts with regard to adequacy of notice. The amended regulation

specifically provides a standard that an employee must meet when providing notice to the employer, in that the employer must be provided sufficient information for the employer "to reasonably determine" that the employee is seeking leave under the FMLA. It also clarifies what type of information should be provided to satisfy the employee's obligation to provide adequate notice. Thus, the amendments to 29 C.F.R. § 825.303 speak directly to the differences Brown attempts to demonstrate in the Circuits' approaches to deciding whether an employee has provided sufficient notice to his or her employer that FMLA leave was being sought.

Circuits which had previously adopted more expansive views of the adequacy of employee notice under 29 C.F.R. § 825.303 prior to the 2009 amendments will undoubtedly be required to reevaluate those views in applying the amended regulation. As discussed above, at least one circuit has recognized that the amended regulation places a higher burden on the employee, compared to the prior version of the regulation. *See Saenz*, 613 F.3d at 582 n. 9. This signifies that the circuits will be re-examining their prior standards regarding adequacy of an employee's notice based upon the amended regulation. Thus, not only does the amended regulation speak specifically to the adequacy issues Brown seeks to raise to this Court, the amended regulation makes material changes to the standard an employee must satisfy.

Nevertheless, Brown argues that *certiorari* should be granted, asserting the amendment of 29 C.F.R. §

825.303 does not resolve the purported circuit split. However, Brown presents no authority to support his assertion that any pre-existing circuit split persists. He neither cites nor discusses any district or circuit court cases applying the amended regulation that provides any evidence of a continued split between the circuits on these issues. Rather, he only relies upon two pre-amendment cases, *Cavin v. Honda of America Manufacturing, Inc.*, 346 F.3d 713 (6th Cir. 2003), and *Stevenson v. Hyre Electric Company*, 505 F.3d 720 (7th Cir. 2007). Neither of these cases, which apply the *prior* version of 29 C.F.R. § 825.303, yield any basis for concluding that the circuits will meaningfully differ as to their application of the *amended* regulation.

Brown's failure to demonstrate that there exists any substantial conflict between the circuits (or even district courts in different circuits) regarding such assessments *after* the 2009 amendments to 29 C.F.R. § 825.303 suggests that either the amended regulation has resolved any divergence between the circuits or it is too early to assess what, if any, differences will emerge between the circuits in their application of the amended regulation. Thus, granting *certiorari* would be either unnecessary or premature. In either event, such review would be improvident, and Brown's Petition should be denied.

C. Brown Has Failed To Demonstrate Any Meaningful Differences Between The Circuits Regarding Their Application Of The FMLA Notice Requirements.

Brown contends that a split exists between the various circuits as to how they are applying the FMLA requirement that an employee provide sufficient notice to apprise his or her employer FMLA-qualifying leave is being sought. He also contends that notice would have been adequate in the case at bar if the standards of any other circuit would have been applied. Neither argument is persuasive.

Brown first argues that several competing standards have emerged for determining if an employee has provided adequate notice to his or her employer to trigger the employer's obligations under the FMLA. He contends that the Circuits have diverged into six different standards, roughly divided as follows. First, he describes the First Circuit as requiring the employee to state only that leave is needed. Second, Brown asserts that the Tenth Circuit requires the employee to provide enough information to indicate employee might qualify for FMLA leave. Third, Brown asserts that the Fourth, Fifth, Ninth, and Eleventh Circuits require an employee to state reason leave is needed. Fourth, Brown contends that the Second and Sixth Circuit standard is that an employee must reasonably apprise employer of request to take time off for serious health condition. Fifth, he argues that the Seventh and Third Circuit standard is that the

employer must be provided sufficient info to have "probable cause" that employee is entitled to FMLA leave. Sixth, and lastly, Brown contends that the Eighth Circuit applies a more stringent standard, that an employee must provide sufficient information to apprise employer that leave is sought for serious health condition *and* advise when the employee expects to return to work.

While Brown argues that these standards are divergent and constitute a circuit split that this Court should resolve through granting his Petition, he makes no demonstration that courts within different circuits have actually reached different outcomes on similar sets of facts. Nor does Brown discuss any circuit case expressing disagreement with how another circuit has applied the applicable FMLA regulations with regard to adequacy of notice by an employee. Thus, Brown's claim that a circuit split exists should be approached with considerable skepticism.

Rather than point to any direct disagreement between the circuits, Brown focuses on the particular language used by circuit courts in explicating their understanding of the applicable regulatory standards. He does not contrast, however, how the courts are actually *applying* that language. In short, he has not shown that the circuit courts are actually reaching divergent outcomes.

Review of the extant case law undermines Brown's argument that there are significant or material differences between the Circuits in their

application of the applicable FMLA regulations. Instead, the differences, if any, between the circuits on these issues are minor. For example, the Third Circuit has described the standards applied by the Fifth and Sixth Circuits as "nearly identical," in contrast to the distinction Brown attempts to draw between those Circuits. *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3rd. Cir. 2007). Thus, under Brown's classifications, the standards applied by over half of the circuits (the Second, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits) are not materially different. What Brown is attempting to describe as a "circuit split," appears to be little more than different circuits describing the same general standard in different ways, with little, if any real difference between them.

In short, Brown attempts to create a circuit split out of authority that is applying the same regulatory standard, 29 C.F.R. § 825.303 (1995). That standard requires the employee to provide notice to his employer that he is seeking FMLA-qualifying leave. In order to qualify for FMLA leave, the absence must be due to a serious health condition. The regulatory definition of "serious health condition" is complex, having multiple tests. Any differences between the express reasoning of the circuits in these cases is more likely due to the facts of individual cases and how they apply to the regulatory definitions, rather than any real differences in the underlying standards applied by the Circuits.

While the circuit courts might differ as to the specific language used to articulate the applicable standard employed in each Circuit, the application of that standard does not meaningfully differ between circuits. Rather, there appears to be a consensus among the Circuits that an employee must provide information to his or her employer that will reasonably apprise the employer that that the employee's absence is due to a FMLA-qualifying serious health condition.

One of the earliest articulations of this standard is found in *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995). *See* 66 F.3d at 764. *Manuel*, in turn, has been followed a majority of the circuit courts subsequently addressing FMLA notice issues. *See, e.g., Price v. City of Fort Wayne*, 117 F.3d 1022, 1025-26 (7th Cir. 1997); *Bulmer v. Yellow Freight Systems, Inc.*, 213 F.3d 625, 2000 WL 637066 at *3 (2nd Cir. May 16, 2000); *Medina v. Coors Brewing Co.*, 232 F.3d 901, 2000 WL 1651306 at *2 (10th Cir. Nov. 3, 2000); *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1131 (9th Cir. 2001); *Beaver v. RGIS Inventory Specialists, Inc.*, 144 Fed. Appx. 452, 456 (6th Cir. 2005); *Sarnowski*, 510 F.3d at 402.

Brown also asserts that other circuit courts would have found that he provided his employer with sufficient notice that he was seeking leave under the FMLA. Brown cites and relies upon language from various circuit opinions in an attempt to show how every circuit other than the Eighth Circuit would have concluded that his notice to Freightliner

satisfied his burden under the FMLA. However, he provides no analysis of *any* circuit or district court opinion with a substantially similar constellation of facts to the case at bar. Indeed, the cases he cites and relies upon are readily distinguishable because the employer had substantially more information regarding the nature and extent of the employee's health condition than the paucity of information Brown provided to Freightliner.

1. First Circuit.

Brown argues that the First Circuit hews to a standard by which an employee need only state to his employer that leave is needed to trigger the protections of the FMLA. As there is no First Circuit case so holding, Brown instead cites two district court opinions from the Districts of Massachusetts and Puerto Rico: *Wheeler v. Pioneer Devel. Svcs., Inc.*, 349 F.Supp. 2d 158 (D. Mass 2004),[2] and *DeHoyos v. Bristol Lab. Corp.*, 218 F.Supp. 2d 222 (D. P.R. 2002), in support of his argument. More recent case law emerging from those same district

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[2] The *Wheeler* decision, if not expressly overruled, has been criticized by subsequent decisions issuing from the same district court. For example, with regard to whether notice has been sufficient to invoke the employer's burden to request certification of the employee's health condition, subsequent decisions have held that *Wheeler* should not be followed because it "would require every employer to invoke the full panoply of FMLA mechanisms or be prohibited ever after from challenging the legal adequacy of even the most paltry evidence regarding an employee's medical condition." *Call v. Fresnius Med. Care Holdings, Inc.*, 534 F.Supp.2d 184, 193 (D. Mass. 2008).

courts, however, undermines Brown's analysis. Those more recent cases demonstrate that district courts in the First Circuit have favorably cited and applied the standards adopted by the Fifth, Sixth, and Eleventh circuits.

For example, the District of Massachusetts, in *Zades v. Lowe's Home Centers, Inc.*, 446 F.Supp.2d 29 (D. Mass. 2006), considered whether an employer was entitled to summary judgment on an employee's FMLA claim due to inadequacy of notice. *See generally id.* at 44-47. In its analysis of that issue, it is clear that the district court concluded that more than a mere request for leave is necessary to trigger the employer's obligations under the FMLA. The *Zades* court cited and discussed the unpublished decision of the same district court in *Szabo v. Trs. of Boston Univ.*, 1998 WL 151272 (D. Mass. Mar.18, 1998)). *See id.* at 47. The *Szabo* decision, in turn, applies the standards applied by the Fifth Circuit in *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir.1995), and the Eleventh Circuit in *Gay v. Gilman Paper Co.*, 125 F.3d 1432, 1436 (11th Cir.1997). *Szabo*, 1998 WL 151272 at *5. Those standards require an employee to provide information sufficient to reasonably apprise the employer that FMLA-qualifying leave has been requested. *See Szabo*, 1998 WL 151272 at *5.

Similarly, in *Pagan-Colon v. Walgreens De San Patricio, Inc.*, 2010 WL 1849907 (D. P.R. May 6, 2010), the district court looked to a decision by the Sixth Circuit, in support of the proposition that an employer must be provided information "sufficient to

reasonably apprise it of the employee's request to take time off for a serious health condition." *Id.* at *4 (quoting *Walton v. Ford Motor Co.*, 424 F.3d 481, 486 (6th Cir. 2005)).

Thus, contrary to Brown's assertions, there does not exist a prevailing consensus among the district courts within the First Circuit that a mere request for leave is sufficient to trigger the FMLA. Rather, those district courts apply the same or substantially similar guiding principles as used by the Fifth, Sixth, and Eleventh circuits. Thus, applying Brown's taxonomy and the comparison of the circuits in *Sarnowski, supra*, demonstrates that the district courts in the First Circuit are also applying the same standards as in the Second, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits. Those standards require an employee to provide sufficient information to reasonably apprise the employer that the employee's absence is due to a FMLA-qualifying serious health condition. *See Manuel,* 66 F.3d at 764.

2. Tenth Circuit.

Neither of the Tenth Circuit cases Brown cites stand for the proposition that the Tenth Circuit applies a materially different standard than other circuits in assessing the adequacy of notice to the employer. Nor does either case suggest that the circumstances of the present matter would satisfy that standard.

Brown first asserts that courts within the Tenth Circuit have adopted a standard unique to that Circuit. However, the Tenth Circuit has also cited and relied upon Eighth Circuit case law in discussing adequacy of an employee's notice. *See Bryant v. American Airlines, Inc.*, 75 Fed. Appx. 699, 701 (10th Cir. 2003) (citing *Bailey v. Amsted Indus., Inc.*, 172 F.3d 1041, 1045 (8th Cir.1999)). At least one recent district court case from the Tenth Circuit has also looked to and followed Sixth Circuit case law to assess whether the information provided by the plaintiff was sufficient to notify the employer. *See Brooks v. Via Christi Regional Medical Center, Inc.*, 2010 WL 446523 at *12 (D. Kan. Feb. 4, 2010) (citing *Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 451 (6th Cir. 1999)). These cases suggest that the Tenth Circuit does not consider its analysis of FMLA notice issues materially different than the approach taken by those other circuits.

Both of Brown's cited cases involved notice to the employer above and beyond the notice Brown provided to Freightliner. In *Tate v. Farmland Industries, Inc.*, 268 F.3d 989 (10th Cir. 2001), the employer believed that the employee was unable to work based upon information within a medical examination form, which reflected the employee's disclosure of a history of seizures for which he was taking prescription anti-seizure medication, and therefore put the employee on involuntary sick leave. *See* 268 F.3d at 991, 997. Here, Brown had no notice (either directly from Brown or via a doctor's report) of whether or not Brown was experiencing a "serious health condition," as that term is defined within the

FMLA, and Freightliner did not place Brown on involuntary sick leave. Thus, there is no reasonable basis to conclude that the notice provided by Brown to Freightliner would have been sufficient under the holding of *Tate*.

In *Moss v. Blue Cross, Blue Shield of Kan., Inc.*, 534 F.Supp. 2d 1190 (D. Kan. 2008), the employee had taken intermittent FMLA leave for depression on numerous prior instances. *See*, 534 F.Supp. 2d at 1196-97.[3] Evidence was offered that the employee had left voicemails and sent emails referring to her mental health condition during an extended absence. *See id.* at 1197-98. The employee also requested paperwork for FMLA leave during the absence, and those forms were provided by the employer. *See id.* at 1197. Here, Brown had no prior history of FMLA-qualifying medical treatment related to his alleged back problems, only advised his employer that he hurt his back again, and called in "sick" on each day of his absence from the workplace. He did not request FMLA forms, and went home without completing the injury report forms he had filled out on each of his prior injuries. Thus, *Moss* does not stand for the proposition that Brown's conduct constituted adequate notice to Freightliner that his absence may have been due to a FMLA-qualifying serious health condition.

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[3] The circumstances of *Moss* are strikingly similar to those of *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002), which similarly held that the employer had adequate notice that the employee's absence qualified for protection under the FMLA.

3. Fourth, Fifth, Ninth, and Eleventh Circuits.

Brown cites to *Krenzke v. Alexandria Motor Cars, Inc.*, 289 Fed. Appx. 629 (4th Cir. 2008), for the proposition that the Fourth Circuit requires only a statement that the employee needs to inform the employer that he or she needs leave from work for a medical reason. *See Krenzke*, 289 Fed. Appx. at 632.

Cases interpreting *Krenzke*, however have made it clear that this meeting this standard requires more than saying "I am sick and want time off." Rather, the employee must demonstrate the need for leave. *See Reid v. Hospira, Inc.*, 2010 WL 5173210 (E.D.N.C. Dec. 13, 2010). In *Reid*, the Eastern District of North Carolina concluded that an employee who was undergoing repeated treatments for work-related injury but merely calling in "sick" failed to provide adequate notice. *See id.* [pinpoint cite not available, due to absence of star pagination]. In *Krenzke*, the notice was provided by a doctor's note sent to the employer and was found sufficient notice even though "the note was summary in nature," because "it was received from a medical doctor and stated that an extended leave was needed for medical reasons." *Krenzke*, 289 Fed. Appx. at 633. *Compare, Eze v. City of Durham*, 2010 WL 4740015 (M.D.N.C. Nov. 16, 2010) (finding doctor's note sufficient where it was written on prescription pad and stated "that Plaintiff would be 'out of work indefinitely for medical reasons.'").

Here, Brown provided no doctor's note nor any notice that extended leave was needed for medical reasons. Rather Brown merely left early due to a claimed back injury and then called in "sick" for four consecutive workdays. Thus, the information he provided does not correspond to that found sufficient by courts in the Fourth Circuit to constitute adequate notice under the FMLA.

With regard to the 5th Circuit, Brown relies on *Saenz v. Harlingen Medical Center, L.P.*, 613 F.3d 576 (5th Cir. 2010). In *Saenz*, unlike the case at bar, the employer had "extensive involvement" in the employee's treatment, such that the employer "was not left to wonder what sort of medical problem caused [the employee's] absence or whether that problem qualified for FMLA leave." *Saenz*, 613 F.3d at 581. *Saenz* also discusses an earlier 5th Circuit decision, *Greenwell v. State Farm Mut. Auto. Ins. Co.*, 486 F.3d 840 (5th Cir. 2007), as establishing "minimums" for what notice an employee must provide the employer. The *Greenwell* court noted that "the employee 'must explain the reasons for the needed leave.'" *Greenwell*, 486 F.3d at 842 (quoting *Willis v. Coca Cola Enter.*, 445 F.3d 413, 419 (5th Cir. 2006)). Ultimately, the *Greenwell* court held that "[t]he critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." *Id.* at 842 (quoting *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 977 (5th Cir. 1998)). Presented in such a manner, this standard is indistinguishable from that

applied by the Second, Fourth, Sixth, Ninth, and Eleventh Circuits circuits.

Brown characterizes the 9th Circuit as taking the position that all an employee need do to satisfy the FMLA notice requirement is to "communicate to the employer that he will be absent 'under circumstances that the FMLA might apply.'" While this reflects part of the standard applied by the 9th Circuit, it fails to recognize that the 9th Circuit nevertheless requires the employee to communicate that "leave is needed [for a qualifying reason]." *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 112, 1130 (9th Cir. 2001) (bracketed text in original). Thus, the employee must advise the employer not just that he or she is sick or injured, but that the injury rises to the level of a serious health condition. *See id.* The employee in *Bachelder* satisfied that burden by providing the employer with two doctor's note regarding her absences. *Id.* at 1131. Here, Brown provided no similar documentation to his employer.

Turning to the Eleventh Circuit, that Court has held that an "employee cannot merely demand leave; he must give the employer a reason to believe that he is entitled to it." *Cruz v. Publix Supermarkets*, 428 F.3d 1379, 1385 (11th Cir. 2005) (citing *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 952 (7th Cir. 2004)). The Eleventh Circuit has followed both Fifth and Seventh Circuit precedent in analyzing whether an employee has provided adequate notice under the FMLA. *See id.; Gay v. Gilman Paper Co.*, 125 F.3d 1432, (11th Cir. 1997) (citing *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir.1995), *Price v.*

City of Fort Wayne, 117 F.3d 1022 (7th Cir.1997)). As the Eleventh Circuit's application of the standard is not palpably different from the other two circuits it relies upon, one cannot conclude that a circuit split exists between those jurisdictions. Similarly, the notice provided by Brown fails to meet the Eleventh Circuit's application of the notice standard for the reasons discussed above with regard to the Fifth Circuit, *supra*, and the Seventh Circuit, *infra*.

4. Second and Sixth Circuits.

Brown cites a number of district court cases within the Second Circuit standing for the proposition that "[i]n assessing notice under the FMLA, the critical question is whether information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." *Barnett v. Revere Smelting & Ref. Corp.*, 67 F.Supp.2d 378, 385 (S.D.N.Y.1999). Defendant agrees that this proposition appears in numerous cases arising out district courts in the Second Circuit. What Brown fails to recognize, however, is that standard this was adopted from the *Fifth* Circuit. *See id.* (quoting *Manuel*, 66 F.3d at 764); *Bulmer v. Yellow Freight Systems, Inc.*, 213 F.3d 625, 2000 WL 637066 at *3 (2nd Cir. May 16, 2000). Brown offers no argument for how the Second Circuit's application of that rule differs from how it is applied by the Fifth Circuit.

Similarly, as discussed above, the standards applied by the Sixth Circuit has been held to be

"nearly identical" to that applied by the Fifth Circuit. *Sarnowski*, 510 F.3d at 402. Not surprisingly, the case Brown relies upon, *Cavin v. Honda of America Manufacturing, Inc.*, 346 F.3d 713 (6th Cir. 2004), also favorably cites and relies upon Fifth Circuit case law in discussing the FMLA notice requirements.[4] *See id.* at 724 (citing *Manuel*, 66 F.3d at 764). *Compare, Gipson v. Vought Aircraft Industries, Inc.*, 387 Fed.Appx. 548, 556 (6th Cir. 2010) (citing and relying upon Fifth and Seventh circuit precedent in evaluating whether reports to an employer that an employee was "sick" are sufficient to trigger an employer's duties under the FMLA).

In *Cavin*, the Sixth Circuit held that an employee had provided sufficient notice to his employer by calling in and reporting that he had been in the hospital due to a motorcycle accident and that he was unable to work. *Id.* at 725. Here, Brown merely told his employer that he had hurt his back and wanted to go home, and then called in "sick." Unlike the

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[4] It is notable that *Cavin* does criticize two other circuit court opinions, issued by the Tenth and Seventh circuits, but in regard to the separate issue of whether an employee's failure to comply with an employer's FMLA notice procedures can constitute grounds for denying FMLA leave where an employee's need for FMLA leave is unforeseeable. *See id.* at 721-22 (discussing *Holmes v. The Boeing Co.*, 166 F.3d 1221, 1999 WL 9760, at *3 (10th Cir. Jan.12, 1999), and *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706 (7th Cir. 2002)). That legal issue, however, is not present in the case at bar, which concerns merely the adequacy of Brown's notice to Freightliner, not whether Brown failed to comply with any particular notice procedure implemented by Freightliner.

employee in *Cavin*, Brown provided Freightliner with no information regarding medical treatment or inability to work. Thus, the facts of the case at bar involve information provided to the employer that falls well below what the *Cavin* court considered suitable notice.[5] *Cavin* does not support Brown's claim that the information he provided Freightliner was sufficient to trigger the employer's obligations under the FMLA.

5. Third and Seventh Circuits.

Brown describes the standard adopted by the Third and Seventh Circuits as requiring an employee to present sufficient information that the employer has "probable cause" that the employee may be entitled to FMLA leave. However, this "probable cause" standard has not been adopted by any Third Circuit decision cited by Brown. Rather, Brown relies upon a district court decision for that language. In looking to reported Third Circuit Decisions, however, it is clear that the Third Circuit does not meaningfully diverge from its sister circuits in reviewing questions regarding whether an

[5] In *Gipson*, the Sixth Circuit provided additional indication as to what specific information an employee must provide to satisfy the FMLA notice requirement. Specifically, the employee must "reasonably inform [the Employer] that [the Employee] was presently suffering from 'an illness, injury, impairment, or physical or mental condition that involves ... (A) inpatient care in a hospital, hospice, or residential medical care facility or (B) continuing treatment by a health care provider' as defined in the applicable regulations." *Gipson*, 387 Fed. Appx. at 555-56.

employee's notice to his employer was sufficient to trigger the employer's duties under the FMLA.

In *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3rd. Cir. 2007), the Third Circuit discussed and applied the "nearly identical" standards of the Fifth and Sixth Circuits. *See* 510 F.3d at 403. Thus, to the extent that the Third Circuit applies a "probable cause" standard, it does not appear to meaningfully diverge from the Fifth and Sixth Circuit analysis discussed above.

With regard to the Seventh Circuit, Brown looks to *Stevenson v. Hyre Elec. Co.*, 505 F.3d 720 (7th Cir. 2007), quoting that court as stating that "the notice requirement is not demanding." However, "neither is it illusory." *de la Rama v. Illinois Dept. of Human Services*, 541 F.3d 681, 687 (7th Cir. 2008). Rather, "the notice must succeed in alerting the employer to the seriousness of the health condition." *Stevenson*, 505 F.3d at 725. Here, Brown provided no information to alert Freightliner that Brown had experienced anything other than a minor, transient back injury similar to other back problems he had encountered in the past. The Seventh Circuit has recognized that an employer can sometimes be provided notice by the circumstances surrounding an employee's absence, such as a "dramatic, observable change in [an employee's] work performance or physical condition." *See de la Rama*, 541 F.3d at 687 (quoting *Burnett v. LFW Inc.*, 472 F.3d 471, 480 (7th Cir.2006)). However, such circumstances are not present here. Thus, the FMLA notice standard, as

applied by the Seventh Circuit was not met by Brown in this matter.

6. Eighth Circuit.

Brown argues that the standard applied by the Eighth Circuit differs from its sister Circuits in two respects. First, he argues that the Eighth Circuit requires an employee to advise the employer of when he anticipates returning to work. Second, he argues that the Eighth Circuit also requires that an employee provide the "exact diagnosis" to his employer.

The Eighth Circuit has taken a broader view as to what information an employee can (and perhaps should) provide to an employer to provide adequate notice under the FMLA. Information regarding when an employee anticipates returning to work can help an employer understand that the leave might be FMLA-qualifying, especially if the absence is expected to last more than three consecutive days. *See* 29 C.F.R. 825.114(a)(2)(i) (1995) (discussing three-day incapacity test that to determine whether an illness or injury is a "serious health condition"). Thus, the Eighth Circuit has reasonably inquired, in appropriate cases, whether an employee has provided such information to his employer (especially when other information regarding the seriousness of the employee's health condition is lacking).

However, the Eighth circuit has not made this inquiry a mandatory part of its standard. For

example, in *Murphy v. FedEx Nat'l LTL, Inc.*, 618 F.3d 893, 903-04 (8th Cir. 2010), the Eighth Circuit held that an employee had provided sufficient notice that she was requesting FMLA leave, without any discussion of whether the employee had or had not advised the employer when she expected to return to work. *See id.*

In summary, while the various circuit courts have employed slightly different language in describing the applicable standard for determining the adequacy of an employee's notice to his or her employer that he or she is seeking FMLA-qualifying leave, Brown has failed to demonstrate that these differences in language have resulted in any material differences in how the circuits apply that standard. Rather, the dominant analysis, derived from the Fifth Circuit decision in *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995), requires a showing that

CONCLUSION

For the reasons discussed above, Brown's Petition for Writ of Certiorari should be denied. First, the existence of alternative grounds for affirming the judgment below render it unnecessary to reach the issues raised in Brown's Petition. Second, the case at bar arose prior to the 2009 amendment of 29 C.F.R. § 825.303. As such, this matter would only address the standards applicable to pre-amendment cases, which are finite and dwindling at this point. Lastly, Brown's suggestion that review of this matter is needed to resolve a split amongst the federal circuits as to employees' burden to provide adequate notice under the FMLA is not supported by the reported cases. The extant cases demonstrate no material deviation between how different circuits are applying the regulatory standard. However, even if such deviations among the circuits existed, Brown has failed to make any showing that such differences persist after the 2009 regulatory amendments.

RESPECTFULLY SUBMITTED,

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